Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128

REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.429 of the Commission's Rules,[1] hereby responds to the comments of other parties on petitions for reconsideration and or clarification of the *Fourth Order on Reconsideration and Order on Remand*, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 98-128, FCC 02-22 (rel. Jan. 31, 2002) (the "*Order*") filed in the above-referenced proceeding.[2] In response to the petition of ITC^DeltaCom Communications, Inc., a number of commenters appear to suggest that the decision of the Court of Appeals for the District of Columbia Circuit in Illinois Public Telecommunications Association v. FCC, 117 F.3d 555 (D.C. Cir. 1997), stands for the proposition that the Commission is statutorily obligated to mandate a *direct* payphone compensation contribution from each and every interexchange carrier ("IXC") that terminated toll-free or access code calls from a pay telephone during the interim compensation period. This is patently incorrect.

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[1] 47 C.F.R. § 1.429.

[2] Petitions for reconsideration and/or clarification have been filed by the American Public Communications Counsel ("APCC"), the RBOC Payphone Coalition, WorldCom, Inc. ("WorldCom") ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and Sprint Corporation ("Sprint").

Indeed, no such reading can be supported by statute. As ASCENT's comments indicated, subjecting resale carriers to a direct payment obligation would ensure that such carriers – and only such carriers – would be effectively paying payphone compensation twice, having already remitted this compensation as a component of the wholesale rates charged by their facilities-based underlying carriers during the interim period.

Voicing its opposition, Sprint Corporation asserts that "the Commission cannot exempt all small IXCs simply because one of them professes to be unable to adequately verify its financial obligations,"[3] and repeats its original criticism of the specifically tailored and very limited holding in the *Fourth Order on Reconsideration and Order on Remand*, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 98-128, FCC 02-22 (rel. Jan. 31, 2002) (the "*Order*") that resellers be relieved "from a direct payment obligation for interim compensation."[4] According to Sprint, this "exemption simply cannot be squared with the court's ruling in Illinois."[5]

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3 Comments of Sprint Corporation ("Sprint"), p. 14.

4 *Order*, ¶ 18.

5 Comments of Sprint, p. 14.

Likewise, WorldCom, Inc., characterizes the effect of the D.C. Circuit's decision in a similarly sweeping fashion: "*Illinois* did not vacate the Commission's general decision to assign compensation responsibility to interexchange carriers. Rather the Court vacated the 'small carrier' exemption. Having vacated the exemption, what remained was the general obligation of all carriers who received completed calls to compensate PSPs."[6] And for its part, AT&T notes that "the D.C. Circuit concluded that '[a]dministrative convenience cannot possibly justify an interim plan that exempts all but large IXCs from paying the costs of services received."[7] These assertions, however, fall far short of demonstrating an insistence by the Court that the Commission must adopt a mandatory, direct payphone compensation obligation on all carriers in order to adequately implement Section 276.

What the Illinois decision does stand for is the well-established proposition that an administrative agency must logically support its determinations. The D.C. Circuit found that "the FCC acted arbitrarily and capriciously in requiring payments only from large IXCs – those with over $100 million in toll revenues – for the first phase of the interim plan" and "remand[ed] the matter to the FCC for further consideration."[8] It did so because "[t]he FCC based this decision on concerns of administrative convenience" and "[a]dministrative convenience cannot possibly justify an interim plan that exempts all but large IXCs from paying for the costs of services received."[9]

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6 Comments of WorldCom, Inc. ("WorldCom"), p. 4.

7 Comments of AT&T Corp., p. 6.

8 *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997)

9 Id.

In accordance with the Illinois decision, the Commission has indeed further considered this issue, remedying the shortcomings perceived by the Court of Appeals. Thus, the Commission has held that, "the duty to pay interim compensation should not be limited to carriers with annual toll revenues about $100 million, but should include all IXCs, as well as LECs to the extent that LECs receive compensable payphone calls."[10] At the same time, the Commission "decide[d] to omit resellers from a direct payment obligation for interim compensation", not for reasons of administrative convenience, but rather, "because the first underlying facilities-based carrier ' is reasonably certain to have access to the information necessary" to ensure that PSPs will receive compensation as directed by Section 276.[11] In short, administrative necessity, rather than administrative convenience, has motivated the Commission to exempt resale carriers not from an overall contribution obligation, but rather from a *direct* payment obligation. Furthermore, as ASCENT demonstrated in its comments, this is the only outcome which could be squared with Section 276 since it is the only outcome which would avoid visiting a duplicative payment obligation on such carriers.

The resale carriers have already paid their underlying service providers the payphone compensation which is attributable to the revenues which such resale carriers have generated for their underlying facilities-based carriers. Not only was this cost of doing business recovered by carriers with annual toll revenues in excess of $100 million prior to the 1996 Act, the practice continued unabated through at a very minimum three-quarters of the interim period since the Rule was not remanded to the Commission by the Court of Appeals until that time. In practice, this method of payphone compensation recovery did not cease following remand by the Court of

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[10] *Order*, ¶ 17.

[11] Id., ¶ 18.

Appeals. ASCENT's resale carrier members did not experience any decrease in rates attributable to a policy switch by their underlying carriers. And as previously pointed out, ASCENT is not aware of a single instance in which a resale carrier was advised by an underlying carrier that its rates were being proportionately reduced because the underlying carrier would no longer be recovering payphone compensation costs from the resale carrier. Thus, this recovery mechanism continued through the totality of the interim compensation period.

With respect to this issue, ASCENT is in agreement with the RBOC Payphone Coalition both that "requiring facilities-based carriers to pay would satisfy the directive of the D.C. Circuit in *Illinois Public Telecommunications Association*;"[12] and that "the Commission may appropriately rely on facilities-based carriers to pay compensation if that allocation method is the most reliable way to fairly and reliably correlate carriers' compensation obligations with their use of payphones. Sprint's claim that it would be required to bear the compensation obligations of other carriers in that situation is incorrect: Sprint would be liable by virtue of the fact that it carried those payphone-originated calls and charged their reseller customers for that service."[13]

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[12] Comments of the RBOC Payphone Coalition, p. 16.

[13] Id., p. 15.

In remanding this issue to the FCC "for further consideration", the D.C. Circuit certainly did not attempt to dictate the ultimate determination, nor would it have done so. As Sprint points out, "SEC v. Chenery is instructive. The Court refused to find that appellate reversal of the agency's order would 'withdraw all power from that agency to perform its statutory duty' on remand."[14] Although Sprint is less than pleased with the Commission's decision not to impose a duplicative payphone compensation obligation on resale carriers, through the *Order* the FCC has merely performed its statutory duty. Also quoting from *Chenery*, Sprint notes that "'[a]fter remand was made . . . the Commission was bound to deal with the problem afresh.'"[15] This the Commission has also done. Indeed, as ASCENT has pointed out, through its revised interim compensation plan, the Commission has fully effectuated Section 276's "three basic policy objectives with respect to the provision of payphone services: (1) promoting a competitive payphone market; (2) ensuring the widespread deployment of payphones for the benefit of the general public; and (3) ensuring that providers of payphone services receive fair compensation for every call made using their payphones."[16] And it has done so not only without sacrificing administrative efficiency, but also without imposing an effectively duplicative payment obligation on resale carriers. It would be inappropriate for the Commission to alter this result at the request of Sprint or any other facilities-based carrier.

Consistent with the above, ASCENT repeats its request that the Commission should

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[14] Comments of Sprint, p. 12 (internal citations omitted).

[15] Id., p. 14.

[16] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Third Report and Order), 14 FCC Rcd. 2545 (1999), ¶ 1 (*subsequent history omitted*)..

refrain from modifying the revised interim compensation plan set forth in the *Order* in any manner

which would effectively impose a duplicative payphone compensation obligation on resale carriers. Noting in the Illinois decision would require a contrary result.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By:_____/s/_____

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1424 Sixteenth Street, N.W., Suite 105
Washington, D.C. 20036
(202) 293-2500

May 13, 2002

Its Attorneys

CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true a correct copy of the foregoing Comments of the Association of Communications Enterprises has been served by the First Class Mail, postage prepaid, on the individuals listed below, on this 13th day of May, 2002:

John E. Benedict
H. Richard Juhnke
Sprint Corporation
Suite 400
401 Ninth Street, N.W.
Washington, D.C. 20004

Albert H. Kramer
Robert F. Aldrich
Robert N. Felgar
2101 L Street, N.W.
Washington, D.C. 20037-1526

Aaron M. Palmer
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036-3209

Robert J. Aamoth
Steven A. Augustino
Randall W. Sifers
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Lawrence Fenster
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

_____/s/_____
Catherine M. Hannan